INDEX

AUTHORITIES CITED

In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, Inc.
DISSTON DIVISION – DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The issue involved in the instant case–the dictation by the National Labor Relations Board of the terms and conditions of collective bargaining agreements–is a matter of substantial national concern. Approval of such a practice would sharply erode, if not destroy altogether, the principle of voluntary collective bargaining which is the cornerstone of our national labor policy. It is no doubt because of this paramount consideration that in no previous instance in the thirty-four year history of the Act has the Board granted the remedy here sought. And surely, if the Board can penalize the H. K. Porter Company

*This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

by requiring, in order to remedy the particular misconduct here at issue, that Company must agree to a dues checkoff clause, the Board may also penalize other employers and unions for other violations of law by requiring that they agree to other substantive contractual provisions.[1]

The interest of the Chamber therefore, in filing this Brief *Amicus Curiae* in support of the position of Petitioner urging reversal of the decision below, is predicated upon the potentially substantial and far-reaching consequences that the result in that case may have for American industry. Affirmance of the Court of Appeals viewpoint would contravene clear Congressional intent by interposing the Board as an arbiter of "the parties' substantive solutions of the issues in their bargaining."[2] It would also disregard the numerous alternative weapons available in the Board's remedial arsenal as well as the contempt powers of appellate courts, the "ultimate sanction to secure compliance with Board orders",[3] and establish instead an enclave of administrative law where such contempt powers are subordinated to a secondary and inconsequential role. And finally, it would negate the basic tenet of the Act that it is voluntarism rather than compulsion or government fiat which is at the heart of the American collective bargaining system. A matter of this magnitude, the Chamber believes, warrants the presentation of its views before this Court.

SUMMARY OF ARGUMENT

The situation which confronted the Board and Court here—a "recalcitrant employer"[4] whose "sole purpose in refusing a checkoff was to frustrate

---

[1] The Chamber has previously filed briefs *amicus curiae* in *Zinke's Foods, Inc.*, Cases No. 30-CA-372 and 30-RD-400; *Ex-Cello-O Corporation*, Case No. 25-CA-2377; *Herman Wilson Lumber Company*, Case No. 26-CA-2536; and *Rasco Olympia, Inc.*, Case No. 19-CA-3187, all presently pending decisions before the Board. These cases, which involve the issue of "whether the Board has authority to order an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in good faith," raise many of the same considerations as the instant case. See Section IV of the Argument Section of this Brief.

[2] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486-7 (1960).

[3] *NLRB v. Warren Company, Inc.*, 350 U.S. 107, 113, (1965).

[4] It is assumed, *arguendo*, for purposes of this Brief, that the H. K. Porter Company has been properly classified as a "recalcitrant employer." This assumption, however, is clearly open to serious question in light of the Company's *overall* conduct. The Company bargained frequently with the Union; it reached agreement on all items involved except for the proposed checkoff clause; it signed a contract which the Union also executed; and it subsequently offered to bargain with the Union with respect to alternative methods of dues collection. The Board concluded that in these circumstances there was no basis for initiating a contempt action against the Company since it had "satisfactorily complied" with all provisions of the Court's Order (App. to Pet. for Cert., p. 18). It is difficult to understand how, therefore, the Company can be repeatedly viewed by the Court below and the Board as a habitual offender of the most reprehensible type. Cf. Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case*, 35 Univ. Chi L. Rev. 777, 784-6 (1968).

agreement with a union"[5] – is one which obviously warrants the invocation of a strong and effective remedy. But the exigencies of the problem provide no excuse for abandoning the guiding principles and purposes of the Act. Moreover, other feasible alternatives are available which both remedy the matter at hand while accommodating these basic policies. The decisions below recognized that the present case involves a conflict between the concept of the employer's duty to bargain with the representative of his employees and the competing concept of his freedom of contract; they rationalize the remedy devised as one "which will best effectuate the one [concept] at least cost to the other." (App. to Pet. for Cert., pp. 25, 34). We take issue with this critical conclusion for the following reasons:

First, that the remedy here devised is diametrically contrary to the mandate of Congress that, in order to preserve the concept of freedom of contract, the Board should have no power *whatsoever* to "sit in judgment upon the substantive terms of collective bargaining agreements.";[6]

Second, that the remedy here devised is not the only alternative, nor even necessarily the most effective or desirable alternative, that the Board and courts may utilize to rectify the problem of an employer who repeatedly refuses to bargain in good faith; and

Third, that the remedy here devised proceeds from an erroneous view of collective bargaining; it fails to recognize that the determination of the terms and conditions of employment, under a system where the government does not control the results of bargaining, is predicated on the mutual understanding and free assent of labor and management; and

Fourth, that the remedy here devised is not necessarily limited to the particular factual situation involved in the instant case but, conversely, represents a dangerous intrusion into the process of voluntary collective bargaining which will no doubt be utilized by the Board to justify even further and more serious intrusions as, for example, in cases such as those cited at footnote 1, *supra*.

---

[5]The finding of the Board and the Court below in this respect, predicated on the premise that the grant of a check off "is of no consequence whatever to the employer" (App. to Pet., p. 28), seriously misconstrues the realities of bargaining. First, some employers may legitimately resist a checkoff on the basis that it "strengthens the union and increases its ability to press home its demands in later negotiations". Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case*, *supra* n. 4, p. 784. In other cases, employers may reasonably refuse a checkoff as the result of the contrary belief that the absence of such a provision actually makes for a more effective collective bargaining relationship by compelling the union to be responsive to the grievances of its constituency and by providing it with a forum through the necessity of dues-collection to obtain knowledge of such grievances. In either case, even though the Court and the Board may not categorize such considerations as "business reasons" for resisting a checkoff demand, the employers' motives are nevertheless of substantial importance to their operations and entirely consistant with the policies of the Act.

[6]*NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

ARGUMENT

I.

CONGRESS DID NOT INTEND THAT THE BOARD SHOULD BE EMPOWERED UNDER ANY GUISE TO DETERMINE THE SUBSTANTIVE TERMS OF COLLECTIVE BARGAINING AGREEMENTS

The crux of the decision below is the supposition that the Congressional intent manifested in Section 8(d) of the Act[7] relates only

> "to *'whether* a Section 8(a)(5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred.' Once the failure to bargain in good faith has been determined, the formulation of an order to remedy the effects of the unfair labor practice is governed by the policies which underlie Section 10(c) of the Act." (Emphasis the Court's; Bd. Opp. to Pet. for Cert., p. 8).

This contention represents a substantial misconception of the Act. In interpreting the remedial limitations of Section 10(c), it is essential to study the intent of Congress in adopting the underlying unfair labor practice which the Board's order seeks to remedy, in this case Section 8(a)(5) as clarified by Section 8(d). Congress thus intended that "the power of this Board to issue orders is strictly limited to the preservation of the industrial freedom granted specifically by the [Act]"[8] and the Board's remedial power necessarily "has the essential limitations which inhere in [not merely the policies which underlie 10(c) but in] the very policies of the Act which the Board invokes."[9] Nor may a Board order be justified on the basis of deterring future violations of the Act, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up a system of penalties which it would deem adequate to that end."[10] Board orders, in short, must be "persuasively . . . related to the proven conduct"[11] and must be "functions of the purposes to be accomplished."[12]

Congress has made it abundantly clear that one of "the essential limitations which inhere in the very policies of the Act" is that the Board is precluded from regulating the terms and conditions of collective bargaining agreements

---

[7]Section 8(d), which defines the bargaining obligation, specifically limits that obligation by providing that it "does not compel either party to agree to a proposal or require the making of a concession . . . ."

[8]Speech of Senator Wagner, 79 Cong. Rec. 6184 (1933).

[9]*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939).

[10]*Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

[11]*NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).

[12]*NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

regardless of the talisman used to justify such regulation. In 1935, when the Senate Committee inserted the bargaining duty into the Act, it said:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." S. Rep. No. 573, 74th Cong., 1st Sess. 12, 2 Leg. Hist. of the National Labor Relations Act of 1935 at 2312.[13]

Statements of the same nature were also voiced in the House. Congressman Connery, Chairman of the House Committee on Labor, stated that the "bill just compels [the employer] to deal with the men collectively";[14] Congressman Griswold declared that "The bill does not fix hours, wages, or working conditions nor does it allow any Government agency to do so"[15]; and Congressman Welch expressed the view that "nothing in the bill allows the Federal Government or any agency to fix wages, regulate rates of pay, limit hours of work, or to effect or govern any working condition in any establishment or place of employment."[16] See also the similar statements of this Court in *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

In 1947, Congress, expressing the fear that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of the concessions an employer must make and of the proposals and counter proposals he may or may not make" concluded that "unless Congress writes into the law guides for the Board to follow the Board may attempt to carry this process even further and seek to control more and more the terms of collective bargaining agreements".[17] The House Conference Report subsequently described the resultant bill as having achieved this objective: "... the Senate amendment [Section 8(d)], while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as did the House bill in this regard, since it rejected, as a factor in determining good faith, the test of

---

[13] Senator Walsh, Chairman of the Committee on Education and Labor, similarly explained the bill which his Committee reported to the Senate:

> "Nothing in this bill allows the Federal Government or any agency to fix wages, to regulate rates of pay, to limit hours of work, or to effect or govern any working condition in any establishment of place of employment.
>
> "... There is nothing in this bill that compels any employer to make any agreement about wages, hours of employment, or working conditions with his employees." 79 Cong. Rec. 7659 (1935); 2 Leg. Hist. of the Labor Relations of 1935 at 2373.

[14] 2 Leg. Hist. of the Labor Relations Act of 1935 at 3118.

[15] 79 Cong. Rec. 9682 (1935).

[16] 79 Cong. Rec. 9711 (1935).

[17] 1 Leg. Hist. of the Labor-Management Relations Act of 1947 at 310-2.

making a concession and thus prevented the Board from determining the merits of the position of the parties."[18] This Court,[19] as well as others,[20] have subsequently voiced similar views.

In sum, both the legislative history of the Wagner and Taft-Hartley Acts, as well as numerous decisions of this Court, make it plain that Congress did not intend that the Board should have the power it seeks to exercise in the instant case. Indeed, during the thirty-four years prior to the present case, no authority is cited by either the Board or the Court which has even suggested that the Board has such authority. As this Court recently observed in another context: "No amount of drum-beating should be permitted to overcome, without legislation, this history."[21]

The Court of Appeals here seeks to overcome this history, and somehow discover in the interstices of the Act a heretofore undisclosed power in the Board to compel unilateral contractual concessions, by invoking as a touchstone the Board's remedial powers under Section 10(c) of the Act. That Section, however, expressly limits the Board to remedies which will "effectuate the policies of the Act" and, in addition, is further restricted by the well-established principle that Board remedies must perform a restorative, rather than a deterrent or penal, function.[22] Compelling agreement to certain terms and conditions of employment performs no restorative function; in the present case it "in fact gives the union something which, but for the 8(a)(5) violation, it probably could not have achieved."[23] Thus, "what the Board has done, in the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf."[24]

The remedy fashioned by the Board similarly does not effectuate the policies of the Act. The Board, at least "indirectly", is thereby permitted "to sit in judgment upon the substantive terms of collective bargaining agreements."[25] For example, the decision below viewed the requirement that a checkoff be

---

[18] *Id.* at 538.

[19] *NLRB v. American National Insurance Company, supra; NLRB v. Insurance Agents International Union, supra.*

[20] *NLRB v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir., 1955); *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir., 1960); *NLRB v. Lewin-Mathes Co.*, 285 F.2d 329 (7th Cir., 1960); *NLRB v. American Aggregate Co.*, 335 F.2d 253 (5th Cir., 1964); *Retail Clerks International Association v. NLRB*, 373 F.2d 655 (D.C. Cir., 1967).

[21] *NLRB v. Gissel Packing Co.*, 395 U.S. at n. 17.

[22] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-6.

[23] Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case*, supra n. 4, p. 787.

[24] *NLRB v. Lewin-Mathes Co., supra*, quoting *NLRB v. Nash-Finch Co.*, 211 F2d 622, 627 (8th Cir., 1954).

[25] *NLRB v. American National Insurance Company, supra*, at 404.

granted as "at most a minor intrusion on freedom of contract" and held that, as a result, the Company could be required to make a "reasonable" counter-offer or even be compelled to agree to such a clause "in return for a reasonable concession by the union" (App. to Pet. for Cert., pps. 27-9 and fn. 17). Such an approach raises a host of questions which Congress clearly did not intend for Board resolution. Is the grant of a checkoff actually only a "minor" intrusion[26] and, if so, what type of forced agreements should then be categorized as a "major" intrusion? How much is a checkoff worth, i.e., what would constitute a "reasonable" counter-offer or a "reasonable" concession? Would a similar remedy have been invoked if the Company had not *twice* refused to bargain in good faith or had not been a "recalcitrant" employer or if a first negotiation had not been involved? In effect, therefore, by reason of the decision below, the Board must necessarily subject "the parties to direction either by compulsory arbitration or the more subtle means of determining that the position is inherently unreasonable, or unfair, or impracticab le, or unsound".[27]

II.

THE REMEDY DEVISED BY THE COURT BELOW IS NEITHER THE MOST EFFECTIVE NOR THE MOST DESIRABLE ALTERNATIVE AVAILABLE TO REMEDY THE PROBLEM OF THE RECALCITRANT EMPLOYER

The Court of Appeals seeks to legitimatize its intrusion on the parties freedom to contract by the critical assumption "that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer . . ." (App. to Pet. for Cert., p. 26). Such a contention contrasts sharply with the recent pronouncement of NLRB General Counsel Ordman that "despite the generality of the legislative formulation and the conspicuous lack of success of efforts by Congress to fashion more precise formulations, the collective bargaining process has coped extraordinarily well with the problems presented . . . the several Congresses acted with uncanny prescience when they declined to shackle the collective bargaining process with rigid prescriptions which could inhibit the innovative and imaginative talents of the participants in the bargaining process".[28] It also flies in the face of the Fifth Circuit's declaration in *Herman Sausage*, the case principally relied upon by the Steelworkers Union in its Brief in Opposition, that once the decision that a party has bargained in bad faith is made, "the sanctions of the Act are undoubtedly potent, swift and adequate." (275 F.2d at 230).

---

[26] See footnote 6, *supra*.

[27] *NLRB v. Herman Sausage Co.*, *supra* at 231.

[28] NLRB General Counsel Ordman in a speech entitled "Mandatory Subjects of Bargaining" given before the Institute of Collective Bargaining and Group Relations in May, 1969, reprinted at 71 Lab. Rel. Rep. 64, 65 (BNA 1969).

The Ross study,[29] which the Appeals Court relies on to support its assumption of inadequate Board remedies, actually provides little foundation for this assumption. Thus Dr. Ross, while finding that the Act does not contain "adequate and realistic remedies" to cope with the habitual violator of Section 8(a)(5), also found that in most cases where newly certified unions did not succeed in obtaining a first contract "the reasons for the breakdown of bargaining were not related to employer's refusal to bargain or other unfair labor practices;"[30] that the law was not "relatively ineffective" in this area;[31] that there were "only a bare handful of cases" which involved repeated violations of the bargaining obligation;[32] and that in such cases the "employers who elect to persevere in their hostility to collective bargaining run known and ascertainable risks [which] . . . include economic action undertaken by a union, the expense and trouble of litigation and the necessity of observing at some point the specific requirements of an order or decree."[33] Moreover, and of perhaps paramount importance, in those cases where such sanctions were not "fully effective", the remedial recommendations of Dr. Ross expressly contained the caveat that they were:

> ". . . *not to be confused with Board determination of the substantive terms of a contract.* They are remedies designed to cope with the actual effects of a violation upon employee rights; *wages, hours and other working conditions are left to the parties to work out through negotiations.* Their purpose is to impose the *bare minimum* of collective bargaining upon employers who have deliberately sought to gain from their unlawful conduct" (Emphasis supplied).[34]

Dr. Ross' proposals to deal with the "clearcut, naked refusal to bargain cases which are accompanied by widespread unfair labor practices or in the context of repeated violations", were accordingly designed to "reinforce the standard general order to bargain" and "restore the parties as much as possible to their positions prior to the violation." Other observers have made similar recommendations, and have similarly rejected the concept of Board intrusion "into substantive terms of bargaining", to solve the problem of the repeated violator of Section 8(a)(5).[35]

While the Chamber does not necessarily agree with all of the proposals advocated by Dr. Ross and the University of Pennsylvania Note, many of the

---

[29] Ross, *Analysis of Administrative Process under Taft-Hartley*, 1963 Lab. Rel. Yearbook 299 *et seq.* (BNA 1963).

[30] *Id.* at 306.

[31] *Id.* at 309.

[32] *Id.* at 308.

[33] *Id.* at 318.

[34] *Id.* at 319-20.

[35] E.g., Note, *The Need For Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 Univ. Pa. L. Rev. 69, 84-6 (1963). The Note suggests:

> "The NLRB can maximize compliance with the Act by formulating orders that direct the party guilty of bad faith temporarily to perform acts that the statute does

suggestions do have manifold advantages over the remedy utilized by the Board and court below. They would complement, rather than conflict with, the statutory framework of freedom of contract. They would permit easier enforcement and thus be a more effective deterrent. They would be consistent with the remedies fashioned by the Board to meet the problem of recalcitrant employers in other areas of the national labor law.[36] They would, in short, in marked contract to permitting Board regulation of contractual terms, "effectuate [one policy of the Act] at least cost to [competing policies]".

The Court of Appeals' assumption that the Board's remedial powers have proved inadequate also significantly ignores the remedial powers *available to the courts.* As this Court observed in *NLRB v. Warren Company, Inc., supra* at 112-3:

> "The [Court of Appeals] decree, like the [Board] order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming, that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt *as the ultimate sanction to secure compliance with Board orders.* The granting of withholding of such remedial action is not wholly discretionary with the court. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence." (Emphasis supplied; footnotes omitted).

Contempt has long been recognized as the appropriate vehicle for punishing contemptuous conduct and compelling the contemnor "to do what the law requires of him."[37] It provides a broad and flexible weapon which permits appellate courts to impose "whatever sanctions are necessary under the circumstances to grant full remedial relief, to coerce the contemnor into compliance with [the] court's order, and to fully compensate the complainant for losses sustained".[38] Courts of appeals have, accordingly, employed their contempt powers in numerous varied ways to deal with those employers who have repeatedly failed to honor their bargaining obligation: such companies have been required to post appropriate notices, file sworn statements of the steps taken to comply with the court's directive and pay to the Board all fees and

---

not require of a person not guilty of bad faith. *The Board must not intrude into substantive terms of bargaining,* but it might complement the general good faith obligation by ordering the guilty party to assume the burden of commencing negotiations and arranging subsequent meetings, to offer a contract he is willing to sign, to give specific reasons for rejecting the other side's proposals, to make counter-proposals, to send to the bargaining meetings a representative competent to make concessions and reach agreement, or to provide stenographers at the meetings if the nonguilty party does not object . . . ." (Emphasis supplied; footnotes omitted.)

[36] See, *e.g., J.P. Stevens & Co.,* 157 NLRB 869, *mod. & enf.* 380 F.2d 292 (2nd Cir., 1967), *cert. den.* 389 U.S. 1005; *H.W. Elson Bottling Co.,* 155 NLRB 714, *mod. & enf.* 379 F.2d 223 (6th Cir., 1967).

[37] *Penfield Co. v. SEC,* 330 U.S. 567, 593 (1947).

[38] *NLRB v. Vander Wal,* 316 F.2d 631 (9th Cir., 1963) and cases cited thereat.

expenditures incurred in connection with the contempt proceeding;[39] pay a lump-sum compliance fine for their contempt;[40] pay a daily compliance fine;[41] pay both a lump-sum compliance fine (of as much as $30,000) *and* a daily compliance fine (of as much as $1000 a day)[42] be subjected to issuance of a writ of body attachment against their managing officer and to his confinement in custody;[43] and be held in criminal contempt.[44]

Such utilization of the traditional and potent contempt power of the appellate courts is consistent with the policies of the Act. Indeed, its use is specifically sanctioned by Congress in Section 10 thereof. Accordingly, when such contempt powers have not been invoked, particularly where such disuse results from the Board's belief that the respondent involved has satisfactorily complied with the court decree (App. to Pet. for Cert., p. 18), the court should not thereafter on its own motion suggest a novel and self-destructive remedy on the ground that effective alternatives are not available.

III.

THE REMEDY DEVISED BY THE COURT BELOW IS CONTRARY TO THE NATIONAL LABOR POLICY AND WOULD SERIOUSLY ERODE THE STATUTORY SCHEME OF THE ACT

The National Labor Relations Act "does not undertake governmental regulation of wages, hours or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them."[45] This system of resolving disputes and adjusting competitive interests through free and voluntary collective bargaining, with its concommitant rejection of a national labor policy "erected on a foundation of government control of the results of negotiations",[46] has been repeatedly recognized by this Court as "the keystone of the federal scheme to promote industrial peace"[47] and "the essence of the

---

[39] *NLRB v. Merrill*, 414 F.2d 1323 (10th Cir., 1969); *Skyline Homes v. NLRB*, 65 LRRM 3125 (5th Cir., 1967); *NLRB v. Mooney Aircraft, Inc.*, 61 LRRM 2163 (5th Cir., 1966).

[40] *NLRB v. F.M. Reeves & Sons*, 47 LRRM 2480 (10th Cir., 1961), *cert. denied*, 366 U.S. 914 (1961).

[41] *NLRB v. Shannon & Simpson Casket Co.*, 229 F.2d 652 (9th Cir., 1956).

[42] *West Texas Utilities Co. v. NLRB*, 206 F.2d 442 (D.C. Cir., 1953); *NLRB v. Nesen*, 211 F.2d 559 (9th Cir., 1954); *NLRB v. Vander Wal, supra.*

[43] *NLRB v. Savoy Laundry, Inc.*, 354 F.2d 78 (2nd Cir., 1965).

[44] *NLRB v. Star Metal Manufacturing Co.*, 187 F.2d 856 (3rd Cir., 1951).

[45] *Terminal Assn v. Trainmen*, 318 U.S. 1,6 (1943).

[46] *NLRB v. Insurance Agents' International Union, supra* at 290.

[47] *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

federal scheme".[48] As the American Bar Association Section of Labor Relations Law stated in 1965:

"All the provisions of the original NLRA, and most of the provisions of the Taft-Hartley Act, are designed to make possible the negotiation of collective bargaining agreements between the employers and unions. Even so, Congress did not require that the parties must reach an accord, and Section 8(d) was added by the Taft-Hartley Act to make this expressly clear. And Congress retained this policy with full realization that industrial peace was seriously endangered whenever the parties could not come to a mutual understanding. Though Congress found it necessary, in the public interest, to make certain terms and conditions of employment illegal, notwithstanding the mutual understanding of the parties, it carefully refrained otherwise from dictating what any of the terms and conditions should or should not be and declared that the National Labor Relations Board was likewise to leave the resolution of agreements entirely to the mutual understanding of the parties. Thus, the freedom and necessity, if possible, of labor and management negotiating the terms and conditions of employment to govern their relationship is the cornerstone of our national labor policy and must remain so unless and until Congress adopts a different solution to labor-management controversies . . . .

"Except for the necessary imposition of minimum wages and hours, such as in the Fair Labor Standards Act, and the prohibition or regulation in the public interest of certain conditions, as in Section 302 of the Taft-Hartley Act, Congress has left the determination of working conditions entirely to the mutual understanding of the employer and the union representing its employees. What those terms shall be is to be resolved solely by mutual negotiation and free assent by the parties. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *Local 357, Int'l Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 676, 81 S.Ct. 835, 840 (1961). And neither management nor labor is to be subject to compulsion by the Labor Board, or any other agency, to influence their decision. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 80 S.Ct. 419 (1960). Moreover, the Supreme Court has made it clear that Congress alone may determine policy and therefore the NLRB must apply the law as prescribed by Congress and may not impose its own notions of what the law ought to be. *NLRB v. Brown*, [380 U.S. 278]. Voluntarism, then, and not compulsion is the key to our national labor policy." (1965 Proceedings of the American Bar Association Section of Labor Relations Law, pp. 308-9 (ABA 1965)).

Similarly, the alternative of compulsory arbitration has not been employed as a national labor policy. Thus, "the Congressional policy has been emphatic that arbitration may not be compelled by edict but only pursuant to mutual

---

[48] *Division 1287 of Amalgamated Assn, etc. v. Missouri*, 374 U.S. 74, 82 (1963).

agreement .... the federal policy against compelling arbitration in the absence of agreement is even more pronounced. Repeated efforts to enact legislation to compel arbitration in a variety of circumstances have been rejected by Congress (except in the railroad-transportation industry)."[49] In sum, as the Section of Labor Relations Law Report concluded:

> "Our basic national labor policy rejects compulsion. Rightly or wrongly, Congress has declared that terms and conditions of employment are to be prescribed solely by free collective bargaining between a union and the employer of the employees it represents. Therefore, such terms may not be compelled nor imposed on non-consenting parties by judicial decree or NLRB edict."[50]

The remedy adopted in the present case intrudes to a far-greater degree than does compulsory arbitration in the process of voluntary collective bargaining. It does not permit the parties to present and argue their position to an impartial arbitrator; rather, terms and conditions of employment are established by government fiat without regard to the rights of contracting parties and the merits of each side. The decision below thus represents a dangerous extension of present Board policy—a policy which has already seriously eroded the American concept of free collective bargaining and which threatens to convert that remarkably unique and successful system into the chaotic and ineffective method of dispute resolution that exists elsewhere in the world.[51]

IV.

THE REMEDY DEVISED IS NOT LIMITED TO THE PARTICULAR FACTUAL SITUATION HERE INVOLVED BUT WILL NO DOUBT BE UTILIZED TO JUSTIFY EVEN FURTHER INTRUSIONS INTO THE PROCESS OF VOLUNTARY COLLECTIVE BARGAINING

In four cases which have been pending decision before the Board for over two and a half years, the Board is considering the question of whether it has the authority "to order an employer to reimburse his employees for the loss of wages and fringe benefits that they would have obtained through collective bargaining if the employer had not refused to bargain in good faith."[52] These

---

[49] 1965 Proceedings of the American Bar Association Section of Labor Relations Law, pp. 305-6 (ABA 1965).

[50] *Id.* at 318.

[51] See statement of Lee C. Shaw on behalf of the American Newspaper Publishers Association, *Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, Senate, 90th Cong., 2nd Sess., *Cong. Oversight of Administrative Agencies (NLRB)*, pp. 656-80 (Committee Print, 1968).

[52] *Zinke's Foods, Inc., supra; Ex-Cell-O Corporation, supra; Herman Wilson Lumber Company, supra;* and *Rasco Olympia, Inc., supra.* The statement of the issue is as stated in the Board's Notice of Hearing.

cases in all likelihood represent one of the areas into which the Board will proceed if this Court approves of the remedy applied in the present case. The invocation of such an order, despite its speculative and penal nature and notwithstanding the fact that one of the employers involved[53] has refused to bargain as the only means available to obtain judicial review of a representation decision,[54] would represent an even greater intrusion than does the present case upon the process of free collective bargaining. But if the remedy there sought is beyond the Board's powers, the remedy it has devised in the instant case is similarly outside of its authority. The decision below thus represents a dangerous departure from our "long heritage of free men dealing with each other of their own volition, reaching their own conclusions without extensive government control and coercion;[55] it also has the potential for even more substantial departures in the future by the Board in the guise of applying its remedial powers.

---

[53] *Ex-Cell-O Corporation, supra.*

[54] The Act contemplates that an employer desiring judicial review of a representation proceeding must engage in a refusal to bargain in violation of Section 8(a)(5). With very narrow exceptions, this method is the only way to secure such review. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[55] Statement of Union Lawyers before the Section of Labor Relations Law of the American Bar Association, 1966 Proceedings of the American Bar Association Section of Labor Relations Law, p. 351 (ABA 1966).

CONCLUSION

For the above-stated reasons, the decision of the Court below should be reversed.

Respectfully submitted,

MILTON A. SMITH
General Counsel
ANTHONY J. OBADAL
Labor Relations Counsel
Chamber of Commerce of the
United States of America
1615 H Street, N. W.
Washington, D. C.

LAWRENCE M. COHEN
Lederer, Fox & Grove
111 W. Washington Street
Chicago, Illinois 60602
Attorneys for the
Amicus Curiae

LEDERER, FOX & GROVE
111 W. Washington Street
Chicago, Illinois 60602
Of Counsel